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IN THE

Supreme Court of the United States

STATE FARM FIRE & CASUALTY COMPANY,

Petitioner,

v.

UNITED STATES, EX REL.
CORI RIGSBY; KERRI RIGSBY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct.

NACDL was founded in 1958 and has approximately 9,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files here because it has grave concerns that a permissive rule for relators' violations of the seal in *qui tam* cases will threaten defendants' constitutional rights—a very real threat given the Justice Department's emphases on parallel proceedings and prosecution of individual defendants—and the government's interests in fair process and enforcement.

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Petitioner and Respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with Clerk.

SUMMARY OF THE ARGUMENT

A relator filing a *qui tam* action under the False Claims Act ("FCA") may bring an action on behalf of the government. But the FCA does not thereby grant the relator access to the government's prosecutorial machinery and the ability to misuse it. Before the government decides to intervene (or in the event that it does not), the relator is akin to a private litigant and is not empowered beyond that status relative to either the government or the defendant.

Indeed, the seal provision at issue, 31 U.S.C. § 3730(b)(2), is a key check on the relator's abuse of this position. The FCA requires that the relator's *qui tam* complaint remain under seal for sixty days—or longer for good cause upon the government's motion—to give the government the opportunity to review it and decide whether to intervene. *Id.* at § 3730(b)(2)–(4). The legislative history of the seal requirement demonstrates the intent to preserve the government's enforcement power as well as defendants' rights, particularly the knowledge of whether the defendant faces the federal government in the FCA proceeding.

Violations of the seal in the current landscape dramatically undermine this intent. Because the Justice Department refers all *qui tam* complaints to the Criminal Division for consideration of parallel proceedings, and does so with an eye toward individual criminal liability, defendants' Fifth Amendment rights are at risk in any response to the disclosure. Defendants' Sixth Amendment rights are also implicated if the disclosure is used in a media campaign against them, where the prejudice is exacerbated by the one-sided story which defendants—and, often, the government—cannot freely rebut.

Meanwhile, without strict enforcement of the seal, relators have strong incentives to violate it. Informing defendants of the suit while the government's role, including the possibility of criminal charges, is uncertain places relators in an unfair bargaining position. Here, they can cherry-pick the facts, threaten use of an adverse inference in the event defendants invoke the Fifth Amendment privilege, and use underinformed public opinion to color the view of the merits and of potential prosecution. And relators can use the disclosure to rush the government's decision and pressure it to intervene—increasing a relator's chances of success and recovery amount.

ARGUMENT

I. THE STRUCTURE OF THE FALSE CLAIMS ACT AND THE LEGISLATIVE HISTORY OF THE SEAL PROVISION DEMONSTRATE AN INTENT TO PRESERVE THE GOVERNMENT'S INTEREST IN ENFORCEMENT AND THE DEFENDANTS' RIGHTS.

The False Claims Act allows a *qui tam* relator to bring an action on behalf of the government. 31 U.S.C. § 3730(b)(1); see also *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). However, the FCA does not grant the relator the backing of the powerful government machinery to pursue his individual suit. Indeed, the relator has no access to the government's prosecutorial apparatus unless and until the government intervenes, at which point the relator sacrifices control of the suit to the government. 31 U.S.C. § 3730(c)(1).

The statutory design separates the two potential plaintiffs for good reason: The interests of the relator and the government are not identical, and in some circumstances may be at odds. See *United States ex*

rel. Mergent Servs. v. *Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008) (as partial assignees of the government's interest, relators "lack a personal interest in False Claims Act *qui* tam actions."). Thus, multiple provisions in the statute check the power of the *qui tam* relator to ensure the government's control, both upon intervention and when the government declines to intervene. *E.g.*, 31 U.S.C. § 3730(b)(2)–(3), (c); see also *Riley* v. *St. Luke's Episcopal Hosp.*, 252 F.3d 749, 756 (5th Cir. 2001) (en banc) (upholding constitutionality of *qui tam* provisions as relator is unable "to interfere in the Executive's overarching power to prosecute and to control litigation"); *United States ex rel. Taxpayers Against Fraud* v. *Gen. Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (upholding constitutionality of *qui tam* provisions because "they have been crafted with particular care to maintain the primacy of the Executive Branch in prosecuting false-claims actions, even when the relator has initiated the process").

A review of the legislative history proves the point. The seal provision, 31 U.S.C. § 3730(b)(2)–(3), was intended to maintain this separation, preserving the government's enforcement authority and defendants' rights. In response to indications of rising fraud against the government, Congress amended the FCA in 1986 to strengthen the *qui tam* provisions and encourage private suits. S. Rep. No. 99–345, 99th Cong. 2d Sess. 1986, at 1–2. However, the legislature also recognized the need to "protect[] both the Government and the defendant's interests without harming those of the private relator," and enacted the sealing provision to accomplish this. *Id.* at 24. The amendment therefore required that a relator's *qui tam* complaint be filed under seal and served on the government, which then had sixty days to take over the case

or notify the court that it declines to take over the action. *Id.* at 24–25.

To protect the government's interests, the seal period addressed the Justice Department's concern that a relator's allegations might "tip off" a defendant about an ongoing investigation. *Id.* at 24. But, the seal amendment went even further to ensure government control over the suit in its entirety. For example, the government could intervene before expiration of the sixty-day seal period, extend the seal period for good cause, or bring suit independently if the potential relator did not file before disclosing his information to the government. *Id.* at 24–25; see also *Taxpayers Against Fraud*, 41 F.3d at 1041 (under seal, relator's filing will not "alert the defendants and trigger an evasive mechanism, because the statute clearly requires the relator's filings to be sealed for at least sixty days, and for much longer if the government can show the need"). At bottom, the seal period preserves the status quo between the government and relators: "The initial 60-day sealing of the allegations has the same effect as if the *qui tam* relator had brought his information to the Government and notified the Government of his intent to sue." S. Rep. No. 99–345 at 24.

The same is true of the amendment's approach to defendants' rights. The seal provision was "not intend[ed] to affect defendants' rights in any way"; rather, it was intended to preserve them. *Id.*; see also, *e.g.*, *id.* (noting that, upon expiration of the sixty-day seal period, "the defendant will be served as required under Rule 4 of the Federal Rules of Civil Procedure.").

In particular, the amendment "protect[ed] ... the defendant's interests" by safeguarding the right to know whether the opponent was the federal govern-

ment. *Id.* (seal provision "correct[ed]" the "anomaly[] under which the defendant may be forced to answer the complaint 2 days after being served, without knowing whether his opponent will be a private litigant or the Federal Government."). The seal provision, and the FCA more generally, was not intended to empower private litigants beyond their appropriate role, distinguishing the relator's suit from the government's prosecutorial apparatus.

II. IN THE CURRENT LEGAL REGIME, SEAL VIOLATIONS AUTOMATICALLY INFRINGE DEFENDANTS' RIGHTS.

Under Justice Department policies, corporate officers and other agents are instantly at risk of individual enforcement actions, including criminal prosecution, when a corporation is named in a sealed *qui tam* complaint. Upon filing, the complaint is referred to the government to determine whether to initiate "parallel criminal, civil, regulatory, and administrative proceedings." USAM 1-12.000 (updated Nov. 2015), 9-42.440; see also Memorandum, U.S. Attorney General Eric H. Holder, Jr., *Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings* (Jan. 30, 2012), https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings (given the Justice Department's "high priority on combating white collar crime," *qui tam* complaints, upon filing, should be considered "regarding potential civil, administrative, regulatory, and criminal remedies"). The government may begin a parallel investigation promptly. See USAM 1-12.000 ("Coordination [among Government agencies and departments] should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.").

Specifically, all *qui tam* filings are referred to the Criminal Division for investigation. In September, 2014, Assistant Attorney General Caldwell announced that "[w]e in the Criminal Division have recently implemented a procedure so that all new *qui tam* complaints are shared by the Civil Division with the Criminal Division as soon as the cases are filed. *Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the Taxpayers Against Fraud Education Fund Conference* (Sept. 17, 2014), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-taxpayers-against. This is not simply to check for a related and ongoing investigation, but "to determine whether to open a parallel criminal investigation." *Id.* Indeed, AAG Caldwell "encourage[d] [potential relators] to reach out to criminal authorities in appropriate cases, even when [they] are discussing the case with civil authorities," as the Criminal Division has "more legal tools and investigative techniques" and can "add real value to the investigation." *Id.*

The Criminal Division does not limit the investigation to the corporate entity; indeed, recent policies stress the importance of prosecuting individual corporate officers. *E.g.*, USAM 9-28.210 (updated Nov. 2015) ("Focus on [Corporate] Individual Wrongdoers"). As memorialized in the so-called "Yates Memo," the Justice Department outlined "six key steps to strengthen [its] pursuit of individual corporate wrongdoing," including measures that separate individual and corporate criminal liability and prevent universal resolution by the corporation alone. Memorandum, U.S. Deputy Attorney General Sally Q. Yates, *Individual Accountability for Corporate Wrongdoing*, at 2–3 (Sept. 9, 2015),

https://www.justice.gov/dag/file/769036/download; see also, *e.g.*, USAM 9-28.1500 (renumbered and revised Nov. 2015) (Regarding plea agreements, "[n]o corporate resolution should provide protection from criminal or civil liability for any individuals").

A seal violation under this regime necessarily impacts individual defendants' Fifth Amendment rights. The suit itself, and possibly some or all of its allegations, are made public; but the individual defendants cannot respond without "subjecting [themselves] to a 'real and appreciable' risk of self-incrimination" in a parallel criminal proceeding. *United States* v. *Kordel*, 397 U.S. 1, 8–9 (1970). Indeed, the seal provision was drafted to prevent precisely this uncertainty for defendants, whose response to their adversary requires knowledge of whether they face the federal government. See S. Rep. No. 99–345 at 24 (seal provision "correct[ed]" so that defendant would not "be forced to answer the complaint without knowing whether his opponent will be a private litigant or the Federal Government.").

The uncertainty regarding the government's involvement introduces further difficulties for defendants. For one, the government is not yet required to notify defendants of their privilege against self-incrimination. Compare *United States* v. *Stringer*, 535 F.3d 929, 938 (9th Cir. 2008) (SEC in civil proceeding was required to notify individuals that statements could be used against them in a criminal proceeding); see also USAM 1-12.000 (cautioning that "parallel proceedings must be handled carefully in order to avoid allegations of improper release of grand jury material or abuse of civil process"). In addition, the defendants may not be able to invoke the privilege in civil proceedings (*e.g.*, a deposition in another ongoing private suit) even if the relator's disclo-

sure comes up. Compare *In re Seper*, 705 F.2d 1499, 1501 (9th Cir. 1983) (possibility of criminal prosecution is enough to invoke Fifth Amendment privilege) with *Nat'l Acceptance Co. of Am.* v. *Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983) (if there is only "a fanciful possibility" of prosecution, defendant cannot invoke Fifth Amendment privilege); see also *SEC* v *Dresser Indus.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980) (finding "no Fifth Amendment privilege is threatened" in SEC civil investigation despite parallel grand jury proceedings).

Alternatively, if a criminal investigation is ongoing at the time of the seal violation, any response by the defendants regarding the relator's disclosure risks a waiver of their Fifth Amendment rights as to that matter. This extends beyond any single incriminating fact in their response, as "[d]isclosure of a fact waives the privilege as to details." *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). Moreover, any response could trigger an implied waiver. *Klein* v. *Harris*, 667 F.2d 274, 287–88 (2d Cir. 1981) ("There is no doubt that a waiver of the [F]ifth [A]mendment's privilege against self-incrimination may, in an appropriate case, be inferred from a witness'[s] prior statements with respect to the subject matter of the case, without any inquiry into whether the witness, when he made the statements, actually knew of the existence of the privilege and consciously chose to waive it.").

Defendants are trapped between a rock and a hard place, and cannot escape except at the discretion of the court, which may stay the "civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seem[] to require such an action." *Kordel*, 397 U.S. at 12 n.27 (collecting cases); see also *Arden Way Assocs.* v. *Boesky*, 660 F.

Supp. 1494, 1496 (S.D.N.Y. 1987) (no constitutional right to stay civil proceedings pending resolution of parallel criminal action). And there is no guarantee the court will stay the civil action even when a criminal investigation is underway. *E.g.*, *Dresser Indus.*, 628 F.2d at 1376 (finding "[t]he case at bar is a far weaker one for staying the administrative investigation" where "[n]o indictment ha[d] been returned," despite ongoing grand jury proceedings).

Tellingly, some courts have observed that imposing a seal or protective order in the civil proceedings, in lieu of a stay, may adequately address these Fifth Amendment concerns. *E.g.*, *id.* (because civil proceeding "might undermine the party's Fifth Amendment privilege" in light of a parallel criminal proceeding, courts in some cases "may adequately protect the [G]overnment and the private party by ... entering an appropriate protective order"); *In re CFS-Related Sec. Fraud Litig.*, 256 F. Supp. 2d 1227, 1240 (N.D. Okla. 2003) (when defendants face "Hobbesian dilemma" of invoking Fifth Amendment privilege or avoiding adverse inference in civil proceedings, some courts have used "methods in lieu of a stay includ[ing] sealing answers to interrogatories, sealing answers to depositions, [and] imposing protective orders"). Before an intervention decision has been made, the seal serves the same purpose as the stay—protecting defendants' and the government's interests. See *Brock* v. *Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y. 1985) (stay of civil proceedings upon government's motion "is most likely to be granted where the civil and criminal actions involve the same subject matter, ... and is even more appropriate when both actions are brought by the [G]overnment") (internal citation omitted); Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 209–10 (1989) ("Where district courts

have stayed discovery most frequently in civil proceedings at the request of the Government, the stay questions have arisen in situations where the Government seeks to protect ongoing criminal investigations and pending grand jury hearings.") (emphases omitted).

Additionally, a violation of the seal that produces substantial media coverage may implicate defendants' Sixth Amendment rights. "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1075 (1991). "[L]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966).

In the context of parallel proceedings, if an individual in the civil action discloses "evidence which may later become part of the prosecution's case against [a defendant], ... widespread publication of such evidence in advance of the criminal trial might hamper the selection of an unbiased jury and thus prejudice the criminal defendant." *United States* v. *Am. Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 204 (3d Cir. 1967) (internal citation omitted). The court in the civil action must therefore "protect the individual defendants against [any such danger]." *Id.*

The U.S. Attorney's Manual circumscribes prosecutors' public statements to ensure this right. USAM 1-7.500, -7.520, -7.550. Relators, meanwhile, may infringe this right by violating the seal to launch a media campaign, at the same time that prosecutors are considering whether to bring a parallel criminal prosecution.

III. THE SEAL PROVISION MUST BE STRICTLY ENFORCED BECAUSE IT IS OTHERWISE IN RELATORS' PERSONAL INTEREST TO VIOLATE THE SEAL.

Relators have powerful incentives to violate the seal. During the seal period, the relator can gain a strong negotiating position by releasing his version of the facts when defendants are hamstrung in their ability to respond given the threat of parallel criminal proceedings. Defendants are similarly limited in their ability to investigate the matter since they do not have access to the full set of allegations. They therefore see a biased view of the merits of the case and can only negotiate from this position.

A relator can take advantage of these constraints to generate a favorable media climate, which will further inflate the perceived merits of the relator's suit for negotiation purposes. "[P]laintiffs [are] encouraged to make disclosures in circumstances when doing so might particularly strengthen their own position, such as those in which exposing a defendant to immediate and hostile media coverage might provide a plaintiff with the leverage to demand that a defendant come to terms quickly." *United States ex rel. Summers* v. *LHC Grp., Inc.*, 623 F.3d 287, 298 (6th Cir. 2010). Relatedly, such disclosures may increase the perceived threat of official prosecution if the public sees only the relator's myopic view of the facts, or even a limited subset of them. See *It's My Party, Inc.* v. *Live Nation, Inc.*, 811 F.3d 676, 685 (4th Cir. 2016) (finding no basis in the record for satisfying element of antitrust claim despite plaintiff's "cherry-pick[ed] excerpts of [defendant's] communications"). And the relator can capitalize on this uncertainty, as reports about "the defendant . . named in a fraud action brought in the name of the United

States" may mislead public opinion regarding an official prosecution when, in fact, "the United States has not yet decided whether to intervene." *Smith* v. *Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015).

Upon premature disclosure, another tool available to relators in early negotiations is the threat of an adverse inference in the upcoming civil litigation. *Baxter* v. *Palmigiano*, 425 U.S. 308, 317–18 (1976) (Fifth Amendment, when invoked by party in civil case, does not bar adverse inference). With the prospect of parallel criminal proceedings, defendants in the *qui tam* suit may forego speaking to particular matters to avoid self-incrimination. But defendants then may overvalue the relator's chances of success in the *qui tam* suit since an adverse inference would be available.

All of the foregoing circumstances arise from the relator's incentive to take advantage of the uncertainty of the government's intervention during the seal period. But the relator may also violate the seal to encourage the government's intervention, even at the expense of fair process and government resources.

Public knowledge of the *qui tam* suit forces the government to speed up its review and investigative process to minimize the effect of "tip[ping] off" the defendants. S. Rep. No. 99–345 at 24. This contradicts the intent of the seal requirement and renders the extension provision pointless. See *id.* (seal was "intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action").

Furthermore, outside media pressure could force the government to intervene or even initiate parallel criminal proceedings when it otherwise would not. Particularly in a hostile media climate, "it would be unreasonable to suppose that no prosecutor ever is influenced by an assessment of public opinion in deciding whether to bring criminal charges, as opposed to declining prosecution or leaving matters to civil enforcement proceedings, or in deciding what particular offenses to charge." *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003). And, just like defendants, the government may be extremely limited in—or entirely foreclosed from—responding to the relator's chosen story if evaluating the possibility of grand jury proceedings and criminal charges. See USAM 1-7.530 ("Department of Justice shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress.").

The relator has multiple and powerful reasons to violate the seal and force the government's hand. First, the government's intervention is strongly correlated with the success of the suit. For *qui tam* cases between 2005 and 2014, 89.5% of those in which the government intervened were successful (resulted in recovery, such as through a settlement or favorable judgment), while only 6.8% of those in which it did not intervene were successful. Michael Lockman, Comment, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1564 (2015); see also U.S. Chamber Inst. For Legal Reform, *The New Lawsuit Ecosystem: Trends, Targets and Players*, at 63 (Oct. 2013), http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf ("Nearly all the cases in which the federal govern-

ment intervenes lead to a favorable judgment or settlement."). While this correlation may be attributed in part to the government's review of the merits of the suit before deciding to intervene, the investigative resources of the government cannot be underestimated. See *supra Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the Taxpayers Against Fraud Education Fund Conference.*

Second, total recovery is typically much greater in suits in which the government intervenes. For successful *qui tam* cases between 2005 and 2014, the average total recovery in a suit in which the government intervened was $18.9 million—almost seven times the average total recovery in a suit in which the government did not intervene, which was $2.8 million.[2] The typical relator's share is corresponding-

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[2] These numbers were calculated from the Justice Department's publication of fraud statistics, U.S. Dep't of Justice Civil Division, *Fraud Statistics Overview: October 1, 1987 September 30, 2015*, at 1–2 (Nov. 23, 2015), https://www.justice.gov/opa/file/796866/download, assuming a government intervention rate of 23.4%, success rate of intervened cases of 89.5%, and success rate of nonintervened cases of 6.8%, Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, at 1563–64. *See also* U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem*, at 63 (Oct. 2013) ("[Justice Department] intervenes in about 25% of filed qui tam cases"); Press Release, U.S. Dep't of Justice, *Acting Assistant Attorney General Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement* (June 7, 2012), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-stuart-f-delery-speaks-american-bar-association-s-ninth (government intervention rate of approximately 20% has remained fairly constant since 1986). Although the calculated numbers also assume that the number of *qui tam* actions filed between 2005 and 2014 correspond to the recoveries during this same period, any discrepancy at the margins caused by this as-

ly much higher in a case in which the government intervenes: Even at the maximum statutory relator share in a nonintervened case (30%), the average relator would receive only $840,000. 31 U.S.C. § 3730(d)(2) (relator share in nonintervened case is 25–30%). By comparison, a relator awarded the *minimum* statutory share in an intervened case (15%) would receive $2.8 million—more than three times as much as the former. 31 U.S.C. § 3730(d)(1) (relator share in intervened case is 15–25%).

Third, the relator in a case in which the government intervenes does not have to shoulder the entirety, or even the majority, of the discovery and litigation burden but can pass these on to the government. The relator can therefore avoid both the prejudgment outlays and the loss associated with the difference between the actual and reasonable costs. See 31 U.S.C. § 3730(d)(1)(2) (only reasonable expenses and attorney's fees are recoverable).

Strict enforcement of the seal is required to deter relators' abuse of this temporary circumstance. A bright-line rule should apply to protect the government's interest in fairly enforcing the law and defendants' rights to fair proceedings in both the civil and criminal context.

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sumption should not significantly affect the averages calculated over the entire period. *See, e.g.*, U.S. Dep't of Justice Civil Division, *Fraud Statistics*, at 1 (*qui tam* actions filed in 2003 (334) and 2004 (432) are similar to the number filed in 2005 (406)).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, or vacated and remanded for further proceedings.

Respectfully submitted,

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